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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 174

JAMES T. HAINES,

Petitioner,

vs.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI AND LEAVE TO PROCEED ON TYPEWRITTEN RECORD AND BRIEF IN SUPPORT THEREOF.

MORRIS LAVINE,
Attorney for Appellant.

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SUPREME COURT OF THE UNITED STATES

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No. 174

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UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI

To the Honorable Fred M. Vinson, Chief Justice of the Supreme Court of the United States and to the Honorable Associate Justices of the Supreme Court of the United States:

This is a Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit from the judgment convicting appellant of counterfeiting under Section 471, Title 18, U. S. C. A. (Cl. Tr. 2).

The leave to proceed is requested also on the typewritten record here as the appellant did in the United States Court of Appeals, as petitioner is without sufficient funds to pay for the printing of same.

Jurisdiction

Jurisdiction is conferred by Title 28, Section 1251 and Section 12541, and by the Rules of the Supreme Court of the United States in Criminal Cases after verdict.

Opinion Below

The judgment of the United States Court of Appeals for the Ninth Circuit was rendered April 17, 1951 (R. 293) one judge, Albert Lee Stephens, dissenting. A petition for Rehearing was duly filed May 15, 1951 and within the time allowed by law, and denied June 6, 1951, Judge Stephens adhering to his dissenting opinion (R. 311).

The opinion of the United States Court of Appeals is to be found on page 293 of the Record and also at 188 Fed. (2d) 546.

Statutes Involved

Title 18, Section 471, U. S. Codes, which reads as follows:

> "§ 471. *Obligations or securities of United States.*
>
> "Whoever, with intent to defraud, falsely makes, forges, counterfeits, or alters any obligations or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both."

Fifth Amendment to the Constitution of the United States, which reads as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against

himself, nor be deprived of life-liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Rule 5, Rules of Criminal Procedure for the District Courts, which reads as follows:

"Rule 5. *Proceedings before the Commissioner.*

"(a) Appearance Before the Commissioner. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

"(b) Statement by the Commissioner. The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules."

Statement of the Case

The appellant, James T. Haines, had caused the arrest of one Robert White, who was sentenced to the penitentiary for counterfeiting. White thereafter became a witness against appellant and accused appellant of aiding and abetting White in the counterfeiting activities.

The Government's case is founded on the testimony of White (R. 128) except for certain alleged confessions secured from the defendant after he was taken into custody

and before he was arraigned (R. 80, 105, 106) and (Government's Exhibit 15—R. 106).

It appears that Mr. Carl L. Eliason, a secret service agent, had been previously acquainted with the defendant and within a few minutes after his contact of the defendant, between 9:00 and 10:00 o'clock, he told the defendant he was under arrest and must accompany him to the secret service office.

He then engaged in conversation with the defendant on the way down to the office, at which time he asked the defendant to empty his pockets and caused the defendant to be questioned in the Secret Service offices. He questioned the defendant without taking him down for arraignment, as required by Rule 5 of Rules of Criminal Procedure (R. 90, et seq.).

After Eliason had secured a purported confession from the defendant prior to arraignment, he took the defendant to the office of the United States Attorney, again prior to arraignment and prior to his being represented by counsel or having any friend present (R. 94, 227, 229).

These purported confessions were admitted in evidence against the appellant although the purported confessions were obtained before arraignment and while the defendant was in illegal custody. The Court of Appeals, in a two to one decision, affirmed the judgment of the District Court.

Judge Stephens, in his dissenting opinion, stated:

> "It seems to me, though, that the United States Supreme Court has left no area for discretion to the lower courts in the subject of admitting confessions in evidence which have been given by persons while under police detention and while being intentionally withheld from presentment to a magistrate."

Questions Presented by This Petition

1. Whether the alleged confessions were improperly admitted in evidence in view of Rule 5, Rules of Criminal Pro-

cedure for the District Courts of the United States and the Fifth Amendment to the Constitution of the United States.

2. Whether the evidence is sufficient to justify the verdict in the light of the fact that the evidence is based almost wholly on the testimony of the actual perpetrator of the counterfeiting.

3. Whether the defendant intelligently and competently waived trial by jury.

Reasons for Granting the Writ

The case raises an important question of criminal law about to be decided by this Court in another case in which this court granted certiorari, to-wit: *Carignan* v. *United States*, 185 Fed. (2d) 954, certiorari granted and which will be argued in the next term of court.

The case also involves important questions of criminal law which have not been, but should be, decided by this Court, on the application of Rule 5, Rules of Criminal Procedure for the District Court to the admission and exclusion of confessions obtained prior to arraignment and not before a magistrate.

The case also raises an important question of criminal law on when an accused may have intelligently waived a trial by jury.

WHEREFORE, this petition respectfully prays that this Honorable Court grant certiorari, and further prays that this Honorable Court permit him to proceed on the typewritten record on appeal.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 174

JAMES T. HAINES,

Petitioner,

vs.

UNITED STATES OF AMERICA

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Reference is made to the Jurisdictional Statement, the Opinion Below, Statutes Involved and Statement of the Case as contained in the Petition for Writ of Certiorari as though fully set forth herein.

Summary of the Argument

Certiorari should be granted in this case to resolve all doubt regarding the admission or exclusion of a confession secured by officers of the law who fail to obey Rule 5, Rules of Criminal Procedure of the District Courts and take the accused instead to their private office for interrogation.

In *Silverthorne Lumber Company* v. *United States*, 351 U. S. 385, Mr. Justice Holmes said:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evi-

dence so acquired shall not be used before the court, but that it shall not be used at all."

This court's rulings in *McNabb* v. *United States,* 318 U. S. 332; *Anderson* v. *United States,* 318 U. S. 350; *Malinski* v. *New York,* 324 U. S. 401; *Upshaw* v. *United States,* 335 U. S. 410; *Johnson* v. *United States,* 333 U. S. 10, 14, and *Carignan* v. *United States,* now No. 530, October Term, 1950, are controlling.

In *Johnson* v. *United States,* 333 U. S. 10, 14, the court pointed out that the purposes of arraigning a defendant after his arrest immediately is to afford him the protection of apprising him of his constitutional and statutory rights. Since the detention was illegal the defendant's alleged confession should have been excluded, in the instant case.

II

This case raised the important question not decided by this Court of Whether an Accused Has Intelligently Waived Trial by Jury.

The defendant denied such waiver, which was arranged by his counsel after he had formally demanded a jury trial.

The evidence shows that the defendant gave the psychiatrist who examined him at the instance of the court "the impression of being a rather poorly organized individual who apparently does not plan or think ahead too well. He does not appear to be an essentially vicious person." (Report of Dr. Edwin E. McNiel, Clks. Tr. 18).

III

The case also presents an important question of the sufficiency of the evidence in the light of the fact that the evidence came from the actual perpetrator of the crime, who had been turned in by the appellant, and who in turn was now accused by the perpetrator of the crime as an "aider and abettor."

While the testimony of an accomplice, if believed, is sufficient to sustain a judgment in the Federal Courts, the lower courts have frowned upon sustaining a conviction where the case is based upon the testimony of a principal who simply blames the aider and abettor.

Sykes v. *United States,* 204 Fed. 909;
Dahley v. *United States,* 50 Fed. (2d) 37, 44;
Holmgren v. *United States,* 217 U. S. 509, 523, 524.

WHEREFORE, petitioner prays that this Honorable Court grant certiorari and reverse the judgment below, and also that the petitioner be allowed to proceed on the typewritten record on appeal, pursuant to Rule 39 of the Rules of the District Courts of the United States and Rules and leave of this Honorable Court.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Petitioner.

(5870)

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 174

JAMES T. HAINES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The majority and dissenting opinions in the Court of Appeals (3 R. 293) are reported at 188 F. 2d 546.

JURISDICTION

The judgment of the Court of Appeals was entered on April 17, 1951 (3 R. 310). A petition for rehearing was denied June 6, 1951 (3 R. 311). The

petition for a writ of certiorari was filed July 5, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether voluntary oral confessions obtained shortly after arrest and a voluntary written confession obtained immediately after attempted substantiation of the earlier oral confessions were admissible although obtained prior to arraignment.

2. Whether the evidence, which included the testimony of an accomplice, was sufficient to support the verdict.

3. Whether the trial judge abused his discretion in approving a waiver of trial by jury.

STATUTE AND RULES INVOLVED

18 U.S.C. 471 provides:

> Whoever, with intent to defraud, falsely makes, forges, counterfeits, or alters any obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both.

Rule 5(a) of the Federal Rules of Criminal Procedure provides:

> An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to

> commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

Rule 23(a) of the Federal Rules of Criminal Procedure provides:

> Cases required to be tried by a jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

STATEMENT

Petitioner was indicted (1 R. 2) under 18 U.S.C. 471 for the counterfeiting of four $100 Federal Reserve Notes. He was tried by the court without a jury, found guilty (1 R. 46) and sentenced to imprisonment for five years (1 R. 49).[1] The judgment was affirmed by the Court of Appeals for the Ninth Circuit (3 R. 310).

Petitioner and Robert Harold White, an ex-convict (2 R. 18, 43), who became acquainted with petitioner in January 1948, through another ex-convict (2 R. 15-16, 43), carried on experiments at petitioner's residence and developed a photographic process for producing counterfeit notes

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[1] An earlier judgment and sentence of imprisonment for five years (1 R. 20) on a plea of guilty (1 R. 10), were set aside to allow withdrawal of the guilty plea because petitioner claimed "lack of understanding" of the consequences of the plea (1 R. 32-33).

(2 R. 15-17, 19-21, 92). Technical information was obtained from various persons including one Dr. Diehl and one Harry Funk, neither of whom suspected any criminal activities (2 R. 21-22, 34, 92). In July 1948, petitioner and White procured the use of a laboratory where the negative of the $100 bills was made either by petitioner alone or with White (2 R. 35-36). The negative was taken to petitioner's residence where prints were made (2 R. 36). On January 11, 1949, the first counterfeit note was made by petitioner (2 R. 37). This was given to White to pass (2 R. 37). White was present when other counterfeit notes were made (2 R. 41), and passed two other notes (2 R. 39, 41).

Petitioner was arrested by Secret Service Agent Carl Eliason between 9 and 10 a.m. on March 3, 1949 (2 R. 90, 180-181). Shortly after the arrest Eliason told petitioner that he had a right to remain silent and that any statement he made could be used against him (2 R. 97). Petitioner was immediately taken to the Secret Service office in Los Angeles (2 R. 90-91) where he was questioned by Eliason in the presence of two other officers (2 R. 91-93). At this time petitioner orally and voluntarily made the first of three confessions which were admitted in evidence without objection. In each confession he described in detail the counterfeiting experiments carried on by petitioner and White, the technical advice received from innocent parties, the making of the spurious bills which

were turned over to White to be passed (2 R. 91-94, 96).

Petitioner was asked to remove the contents of his pockets, and memoranda descriptive of the counterfeiting process were produced, and later used in evidence (2 R. 11-13, 91). He also told the officers that he had concealed negatives of the counterfeit bills in the laboratory and offered to show them where the negatives were hidden (2 R. 93). At the same time he told the officers that a new tenant was that day in the process of moving into the laboratory building. The officers accompanied by petitioner then went to the office of the Assistant United States Attorney, Mr. Kinnison, to ascertain the advisability of a search warrant (2 R. 94, 226). It was then about 3 or 3:30 p.m. (2 R. 228). On meeting Kinnison petitioner started to discuss the possibility of probation, whereupon he was immediately told that Kinnison had nothing to do with sentences and warned that any statement he made might be used in evidence (2 R. 226). Nevertheless petitioner voluntarily repeated his earlier confession to Kinnison (2 R. 94, 226). This was the second confession admitted in evidence. He also identified four counterfeit notes shown to him by Kinnison as having been made by him and White (2 R. 94, 226). He was informed that a complaint would be filed against him (2 R. 230). It was then about 4 or 4:30 p.m. (2 R. 228).

Petitioner then went with Eliason and another

officer to the laboratory where a thorough search failed to reveal the negatives (2 R. 94). He was returned to the Secret Service office (2 R. 96). By this time it was late in the evening (2 R. 96). At this juncture he was asked if he would repeat his earlier statements in writing and indicated his willingness. A statement was typed by Eliason, read, then signed by petitioner. This was the third confession admitted in evidence. (2 R. 96.) Petitioner was booked in the county jail on the charge of counterfeiting and arraigned the following morning (2 R. 105).

ARGUMENT

1. Petitioner objects (Pet. 4-5, 7-8) to the admission of confessions in evidence, solely on the ground that they were obtained prior to arraignment.[2]

There can be no question as to the admissibility of the oral statements to Eliason and Kinnison. No objection was made to their admission. There is no suggestion that promises or coercion were used to obtain them. They were clearly voluntary. These confessions were obtained almost immediately after petitioner was taken into custody. Certainly the mere fact that a confession was made in the custody of the police does not render it inadmissible. *McNabb* v. *United States,* 318 U. S.

[2] Since he limits his objection to Rule 5, F. R. Crim. P., he is conceding that the confessions were voluntary. He makes and could make no argument otherwise, in view of the record.

332, 346. Furthermore, in *United States* v. *Mitchell,* 322 U. S. 65, 69-70, this Court specifically recognized the right of officers to question a person in custody before arraignment if the delay is not for the purpose of obtaining a confession. The confession shortly after the arrest was admissible in the *Mitchell* case even though followed by eight days without arraignment since the confession was not the "fruits of wrongdoing" by Government officers. The two oral confessions here involved can by no stretch of the imagination be said to have been the "fruits of wrongdoing."

Once it is determined that the oral confessions were admissible, the problem of the written confession resolves itself. It was cumulative and treated as such by the trial judge (2 R. 96, 237, 243-244). He stated:

> When to that [referring to the testimony of petitioner and his wife] you add the full confession, the admissions, which of course he repudiates now, but the admissions before Mr. Kinnison at a time when he cannot possibly claim that he was in a daze and tired out and weary after long talking and questioning, and the contradictions in his testimony, the evasive answers, there is more than sufficient. He didn't answer one question in a straightforward manner from that witness stand, except when he was asked to deny a thing.

The court below properly concluded (3 R. 299; 188 F. 2d at 550):

> This summation by the court of the evidence which influenced its decision renders the admission of the written confession no more than cumulative and, hence, obviously not prejudicial.

Furthermore, the sequence of events made it reasonably necessary to delay arraignment to the following day. Petitioner was arrested between nine and ten a.m. and taken to the Secret Service office where he immediately confessed, at the same time volunteering to show the officers evidence hidden in a laboratory located in San Fernando, a considerable distance from the Secret Service office. Since a new tenant was moving in, it was necessary to act quickly to preserve the evidence. The officers could not afford to take the chance of losing important evidence and at the same time substantiating petitioner's statement. By the time the search was authorized and completed it was evening and the commissioner's office was closed, necessitating postponement of arraignment to the following day. Rule 5 has been construed in the Ninth Circuit to require only that the arrested person be arraigned during regular office hours. *Symons* v. *United States,* 178 F. 2d 615, 620; *Janus* v. *United States,* 38 F. 2d 431, 437. The officers were entitled to rely on this reasonable procedure promulgated by the highest court of the circuit.

The arresting officer under Rule 5 must "take the arrested person *without unnecessary delay*

before the nearest available commissioner". Surely delay is necessary where it is advantageous to a prisoner who may otherwise be subjected to irreparable damage from the inescapable publicity which follows even ill-advised arrests. As was pointed out in great detail and with carefully drawn examples by the court below, some detention before arraignment is inevitable. The court stated (3 R. 307; 188 F. 2d at 554):

> In innumerable cases persons detained and quizzed by law officers promptly produce facts which lead to their immediate release. * * * A further consideration is that conscientious law enforcing officials find it necessary to consider and weigh the possibility of the great harm and public scandal that would surely be visited upon an innocent man if he was carelessly charged with a crime and immediately
>
> arraigned before a magistrate before he could have his own claims, and the facts they might bring to light, checked * * *.

The doctrine that a confession "induced by illegal detention" should be outlawed, for the reason that the Government should not be allowed to avail itself of the "fruits of wrongdoing" by its officers originated in *McNabb* v. *United States,* 318 U. S. 332, and was elaborated in *United States* v. *Mitchell,* 322 U. S. 65, and *Upshaw* v. *United States,* 335 U. S. 410. The *McNabb* doctrine is not a mechanical rule of exclusion. The facts of each case must be considered in their own setting and in the

light of all circumstances. This was made clear by the *Mitchell* case, and the *McNabb* opinion stated that a conviction should not stand "upon evidence secured under the circumstances revealed." (318 U. S. at 347.)

Petitioner would have this Court apply a mechanical rule that failure to arraign an accused before questioning in any manner makes confessions automatically inadmissible. The existence of such a rule was suggested by the separate opinion of Judge Bone in *Carignan* v. *United States,* 185 F. 2d 954, 960 (C.A. 9), pending on writ of certiorari, No. 5, this Term. However, Judge Bone modified his view in the present case and carefully distinguished the earlier *Carignan* case (see 3 R. 303-304, 188 F. 2d at 552-553).

Ordinarily a conflict between decisions of the same Court of Appeals is no basis for the exercise of certiorari discretion since the later decision is considered controlling. See Stern & Gressman, *Supreme Court Practice* 103. Certainly, the fact that one judge has distinguished his earlier separate opinion in a later opinion cannot be called an intra-circuit conflict. There is therefore no such conflict in decisions as would merit the granting of certiorari.

The testimony fails to support the slightest inference that "illegal detention" was resorted to as a means of extorting the confessions. Since none of the confessions was the "plain result of holding

and interrogating persons without carrying them 'forthwith' before a committing magistrate," their admission was not proscribed by the *McNabb* doctrine.

2. The contention (Pet. 5, 8-9) that the evidence was insufficient to support the verdict is so obviously contrary to the facts that it deserved the summary treatment accorded by the court below, where Judge Bone stated (3 R. 297; 188 F. 2d at 548-549):

> In substance and effect the foregoing claims are merely a demand that we weigh the evidence to determine whether the trial judge was justified * * * in concluding that it was substantial and established the guilt of appellant beyond a reasonable doubt. He thought that the evidence was sufficient and so do we, and on such a fact issue his judgment must control. * * *

Petitioner also claims that he was convicted on evidence consisting principally of the uncorroborated testimony of his accomplice White (Pet. 8-9).[3] Petitioner apparently overlooks the well-settled rule that a defendant can be convicted in the federal courts upon the uncorroborated testimony of an accomplice. E.g. *Caminetti* v. *United*

[3] Petitioner's theory that White was the perpetrator of the counterfeiting and petitioner an aider and abettor is contrary to the facts. Petitioner was indicted and convicted under an indictment which alleged both counterfeiting and aiding and assisting in counterfeiting. And certainly there is much in the record which would show that he, not White, was the ringleader.

States, 242 U. S. 470, 495. Furthermore, White's testimony was substantially corroborated. Thus the very incriminating Government exhibits numbered 4 to 10 were found in petitioner's possession (2 R. 11-12) more than three months after he had last seen White (2 R. 170). These exhibits relate to the types of film, formulae, and color toners used in making the counterfeit notes (2 R. 221-222). There was corroboration of White's testimony that petitioner's photographic promotional activities were a blind (2 R. 211, 246). Finally there was ample corroboration in the confessions (2 R. 226-227).

It was within the province of the trial judge as trier of the facts to believe either the corroborated story of White or the denials of petitioner and his wife. He chose to accept the very substantial evidence offered by the Government, and to conclude that the story both petitioner and his wife told was "preposterous and not worthy of belief" (2 R. 247). Their testimony, particularly the evasive denials of petitioner, persuasively supports the conclusion reached by the trial judge. Moreover, it is not for this Court to weigh the evidence or determine the credibility of witnesses where there is substantial evidence taking the view most favorable to the Goverment. *Glasser* v. *United States,* 315 U. S. 60, 80.

3. Finally petitioner variously contends that he

did not (Pet. 8), or did not intelligently [4] and competently (Pet. 5), waive trial by jury.

Contrary to any contention that he did not make a waiver is the formal record (1 R. 41) where petitioner stated that he was desirous of having the case tried before the court without a jury, and requested and consented that the case be so tried. The waiver was signed by petitioner's counsel who recited that she had advised the defendant fully as to his rights and assured the court that his request for a trial without jury was understandingly made. The United States Attorney consented to the waiver which was approved by the court.[5] See F. R. Crim. P. 23(a).

Petitioner waited until he had been found guilty and was about to be sentenced, then, admitting that he had signed the waiver (2 R. 277), claimed that "he was rushed too much and he did not know what he was doing" (1 R. 51), "whatever [counsel] wanted me to sign I signed it, because she instructed me to sign it" (2 R. 277),[6] and that he

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[4] Petitioner does not pretend that he is ignorant and illiterate. He testified that he was educated in high school and university (2 R. 164). To his wife he is "tops" in advertising and promotional work (2 R. 119). His testimony (2 R. 134-142, 147-201) shows that he talks intelligently, using careful English and a broad vocabulary; it also shows an unusual skill in dealing gingerly with the questions of the prosecutor and trial judge.

[5] The Government was prepared for a jury trial and had submitted proposed instructions (2 R. 278).

[6] Petitioner had earlier lost one counsel because he refused to follow his advice (1 R. 4), and had dismissed another (1 R. 39). Compare note 1, *supra*.

"thought it was an order to go ahead with the case" (2 R. 283).

The trial judge held a hearing, calling first the defense counsel who had been impeached by the petitioner. She stated in substance (2 R. 279-282) that she had conferred with petitioner a week prior to the trial regarding the desirability of a jury and recommended waiver. Petitioner said he would think it over and twice before trial advised her that he would leave the matter to her discretion. She discussed the matter with him again the day the case was called and the formal waiver was presented.

The trial judge stated (2 R. 283-284) that his recollection of the facts was that petitioner was asked orally whether he wanted to waive the jury, that he then signed the waiver form and that he was not telling the truth when he stated that he did not know what was going on. The court below (without dissent on this point) remarked (3 R. 296; 188 F. 2d at 548):

> From an inspection of the record we feel that the judge was fully justified in this conclusion.

Since the record (2 R. 270-284) fully supports the trial judge in his conclusion and in the exercise of his discretion on this point, petitioner can complain of no error. See *Johnson* v. *Zerbst*, 304 U. S. 458, 465.

CONCLUSION

The judgment below is clearly correct and no conflict of decisions or questions of importance are presented. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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